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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 262

PEERLESS STAGES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE GREYHOUND CORPORATION

Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The report of the Interstate Commerce Commission (Appendix A, *infra*, pp. A1-A17) is reported at 86 M.C.C. 109. The opinion of the court below (Appendix B, *infra*, pp. A18-A19) is not reported.

JURISDICTION

1. This was an action brought pursuant to 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 to set aside and annul an order of the Interstate Commerce Commission.

2. The order of the three-judge District Court sustaining the order of the Commission and dismissing the complaint, dated May 2, 1962 (Appendix B; *infra*, pp. A18-A19), was entered on May 3, 1962. The notice of appeal, dated

May 24, 1962, was filed in the District Court on May 25, 1962.

3. The jurisdiction of this Court to review the order of the three-judge District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may cut off an existing service on the footing of protecting a carrier from "new competing service."

2. Whether the Interstate Commerce Commission was justified in denying appellant's application for a certificate to enable it to continue a substantial existing service that has been in operation for a number of years on the stated basis that "Existing carriers are entitled to all traffic that they can handle economically and efficiently within the scope of their operating authorities, and unless it can be shown that such carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories, no new competing service should be authorized."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix C, *infra*, pp. A19-A22.

STATEMENT

The only issues that remain in the present posture of this case concern the standards applied by the Interstate Commerce Commission (hereinafter "Commission") in denying the application of the appellant Peerless Stages, Inc. (hereinafter "Peerless") for a certificate of public convenience and necessity, authorizing motor carrier passenger operations over irregular routes, in special or charter operations, from the San Francisco Bay area in California to points in Nevada.

That application was opposed by appellee The Greyhound Corporation (hereinafter "Greyhound") both before the Commission and in the court below.

A. Greyhound's "Special Operations" to Harrah's Club, the largest gambling casino in Nevada

Greyhound owns some 747 buses (Tr. 414).[1] It is the only bus line operating on a regular schedule under a Commission certificate of public convenience and necessity between the San Francisco Bay area and the Lake Tahoe area in Nevada (Tr. 456), and between the San Francisco Bay area and Carson City in Nevada (Tr. 457). It is also the only carrier thus operating between San Jose, California, and Lake Tahoe, Reno, and Carson City in Nevada (Tr. 457). One other carrier, American Buslines, has a certificate between San Francisco and Reno (Tr. 456).

Ever since the beginning of 1953, Greyhound has actively solicited "special operations movements" between points in California and the gambling casinos in Nevada (Tr. 416-417). The distinction between "special operations" and "charter operations," terms that are not separately defined either in the statute or in the regulations, is discussed below, at pp. 10-11 and 16-17.

In connection with its regular operations, Greyhound makes daily (Tr. 447) runs to Stateline, Nevada, stopping there in front of Harrah's Club, perhaps the largest gambling casino in Nevada (Tr. 326, 451). Harrah's Club recently took over two other and smaller casinos (Tr. 451-452). Across the street from one Harrah's Club establishment at Stateline, and next door to another, is the Wagon Wheel, a competing casino (Tr. 326, 330). There is another Harrah's Club establishment in Reno (Tr. 289, 290).

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[1] "Tr." refers to the testimony before the Commission, which was constituted an exhibit and hence part of the record in the court below.

The record reflects the following facts regarding Greyhound's special operations to Harrah's club at Stateline, Nevada: Special tickets are made up for the California passengers going to Harrah's Club; these are printed by Harrah's Club, and contain coupons for both trips via Greyhound, plus a coupon that the passenger presents at Harrah's Club for a refund (Tr. 441-442). Harrah's Club in fact refunds part of the cost of transportation (Tr. 327, 348). As testified to by Hastings, General Traffic Manager of Western Greyhound Lines (Tr. 398), these passengers

> "go to Harrah's Club, because that is where the special operations bus terminates. Harrah's Club guarantees the payment of the minimum number of fares as set forth in the tariff. The buses are operated as for the exclusive occupancy of the patrons of Harrah's Club, and the buses are set up for special operations for Harrah's Club, and the passengers are discharged in the rear of Harrah's Club establishment. They have to at least go to Harrah's Club to get off the bus. We don't care personally what they do after they get off the bus at Stateline." (Tr. 442.)

The bus used for such special operations has a sign on it reading "Harrah's Club" (Tr. 443). One of the ten or twelve ticket windows in Greyhound's San Francisco terminal similarly has a "Harrah's Club" sign placed over it for about 30 minutes prior to the departure of the Harrah's Club bus (Tr. 444). Moreover, Harrah's Club has a booth, three by five feet in size, in the lobby of the waiting room in Greyhound's San Francisco terminal, for which Greyhound charges no rent (Tr. 445). A similar Harrah's Club booth is in Greyhound's Oakland terminal (Tr. 448).

Nevada Lodge, another Nevada gambling casino (Tr. 291), is favored by Greyhound with a similar ticket window sign in its San Francisco terminal (Tr. 444), and with similar booths in its terminals at Oakland, Sacramento, Stockton, and San Francisco (Tr. 445-446). Nevada Lodge is at

Crystal Bay (Tr. 411, 412); this is at the northern end of Lake Tahoe, about 30 miles from Stateline, which is at Lake Tahoe's southern end.

Greyhound expressed its willingness to permit all other Nevada gambling casinos to erect similar booths in its termini to the extent that space permitted (Tr. 445, 446-450). The record shows that there are about 40 gambling casinos in the Reno-Carson City-Lake Tahoe area (Tr. 323), possibly more (Tr. 287). A representative of the Wagon Wheel, one of Harrah's Club's competitors (Tr. 326), testified that he had not been able to get similar terminal concessions from Greyhound (Tr. 328-331); "I was told in my first contact [with Hastings, Greyhound's General Traffic Manager, Tr. 398, 328-329] that it wouldn't be advisable to operate out of the same terminal" (Tr. 338). Hastings corroborated the substance of this conversation (Tr. 421-422).

B. Peerless' operations to other Nevada casinos

Appellant Peerless owns about 45 buses, 12 of which are used in its regular route operations from Oakland south to San Jose and Santa Cruz, the remainder being available for the trips to Nevada now in issue (Appendix A, *infra* pp. A3-A4). It has been operating since 1922 (Tr. 240) and its certificate, issued in 1942, authorized it to engage in charter operations anywhere in the United States (Tr. 256, 300; Applicant's Ex. 35)

Whereas Harrah's Club operates on a basis of refunding some of the fare for transportation (Tr. 327, 348), its smaller competitors "have a policy of offering free transportation to patrons or prospective patrons who desire to visit their establishments" (Appendix A, *infra*, p. A6). As phrased by a Wagon Wheel representative (Tr. 327), "they can refund part of it, which we have never been able to do on a refund basis. We have always been on a free bus status." But, he added (Tr. 333), "we don't want

to run all these free buses. As a matter of fact, that is one of the things that kills us."

For a time, one Travis, doing business as Town and Country Travel Agency, recruited passengers for the other casinos. As found by the Commission (*infra*, pp. A6-A7):

> "Travis advertises extensively in the bay area, offering free transportation on a daily basis to and from the casinos. Patrons desiring to take advantage of the offer make arrangements with Travis for reservations. When a sufficient number of reservations have been recorded, Travis orders a bus from Peerless and arranges for the pickup of the patrons at one or more designated points. If there is sufficient room in the bus at time of departure, casual pickups are accepted without reservations. The buses leave the bay area at specified times in the morning and evening, proceed to the appropriate casino, and, after a stay of approximately eight hours, return to point of origin. The trips have been exceedingly popular. During the period January 1, 1958, to March 15, 1959, Peerless made 892 trips to the casinos, transporting 32,320 passengers, with business picking up substantially after July 1, 1958, when its service supplanted a similar service previously provided by American Buslines, Inc., which because of a labor dispute was forced to suspend operations.
>
> "Peerless receives a single charge from the casinos for each bus load of patrons delivered thereto based upon its published tariffs. Travis is compensated by the casinos at the rate of so much a person, which amount is determined in advance of the undertaking. Travis also appears to receive a commission for travel patrons obtained by Jeanette's; and, until recently, he received a commission from Peerless with respect to the revenues received by it. Generally, the patron does not purchase a ticket, as such, but one of the casinos has adopted a requirement that the patron purchase, prior to departure from the bay area, a so-called 'Fun-Package,' the cost of which is refunded in the form of food, drink, and other benefits after his

arrival at the casino, thus insuring that he will patronize the casino paying for the transportation."

The earlier service by American Buslines, which appears to have been similar (Tr. 68-69, 262-263), was explained to and apparently not questioned by the Commission (Tr. 102-103, 106, 108, 110). Peerless, however, was investigated by the Commission's local representatives, beginning in September or October of 1958 (Tr. 20, 62, 252). Peerless was advised by counsel that its operations were lawful (Tr. 266), but, also on the advice of its counsel, discontinued paying Travis any commissions (Tr. 267).

In November 1958, the Commission brought suit in the court below to enjoin Peerless from carrying on its Nevada operations. A preliminary injunction was denied in February 1959, basically on the ground that the Commission should proceed administratively; but the Commission's complaint was not dismissed. (Tr. 11, 66, 254, 266, 273-275; Comm. Ex. 33, 34, Tr. 277).

In December 1958, during the pendency of the Commission's motion for a preliminary injunction, Peerless filed its application, the one presently in issue, for a certificate of public convenience and necessity, authorizing motor carrier *passenger operations over irregular routes, in special* or charter operations, from the San Francisco Bay area to points in Nevada (Appendix A, *infra*, pp. A3, A12).[2]

Thereafter, in March 1959, the Commission on its own motion entered on an investigation to determine whether the operations of Peerless above described violated Sections 206(a) and 208(c) of the Act or the regulations now found in Part 178 of 49 CFR (Appendix, *infra*, pp. A2-A3).

The investigation resulted in findings that operations of Peerless above set forth did not constitute the transporta-

[2] Insofar as the application sought such a certificate to points in Arizona, New Mexico, and Utah, it has been abandoned, certainly in substance. Appendix A, *infra*, p. A12.

tion of "special or chartered parties" within Section 208 (c) of the Act (*infra*, p. A20), that such transportation accordingly violated the Act, that Travis participated in such violations, and that Travis was acting as a broker without a broker's license, in violation of Section 211(a) of the Act. Cease and desist orders were thereupon entered against Peerless and Travis in respect of such operations. The order was sustained by the court below (Appendix B, *infra*, pp. A18-A-19) and in its cease and desist aspects is no longer contested.

C. Competition between Greyhound and Peerless paralleling competition between rival casinos

The record reflects competition between Greyhound and Peerless paralleling the competition between the gambling casinos that each served, Greyhound in conjunction with Harrah's Club, whose signs were carried on Greyhound buses and in Greyhound terminals (*supra*, p. 4), and Peerless, at least before the date of the judgment below, in conjunction with the Wagon Wheel and the Horseshoe Club.

Harrah's Club, perhaps the largest gambling casino in Nevada (Tr. 326), has two establishments in Stateline, one across the street from the Wagon Wheel and another next to it (Tr. 326, 330, 378), and has still another in Reno, across the street from the Horseshoe Club (Tr. 289, 290).

Passengers felt that using Greyhound buses entailed an obligation to patronize Harrah's Club (Tr. 348, 378-379), and while they were free to go elsewhere (Tr. 379), plainly the Harrah's Club refund portion of the ticket sold by Greyhound (Tr. 442) would not be cashed by any competitor. The Wagon Wheel's view of Greyhound service is (Tr. 334) that "we are surrounded by Harrah's operations." The Wagon Wheel was refused permission to place a placard in Greyhound's Sacramento terminal un-

less it signed for Greyhound's special operations (Tr. 341-342).

The Wagon Wheel sought to use Greyhound's service, but was unable to, in part because of the Harrah's Club competition at Greyhound terminals (Tr. 328-329, 330-331), in part because the rate was too high (Tr. 342).

A number of tavern operators were unable to charter Greyhound buses to take groups of their customers to Nevada casinos (Tr. 355-356, 359-360, 368-369, 383, 390-391); according to Greyhound, this was because the customers had been individually solicited (Tr. 429-430, 434-435).

Greyhound quoted the Wagon Wheel $8.80 per passenger from San Francisco to Stateline, Nevada, plus tax (Tr. 420, 450, 451), but on special operations quotes Harrah's Club only $6.77 plus tax (Tr. 450-451). Moreover, Greyhound assigns better buses—the so-called "Highway Travelers"—to its Harrah's Club trips (Tr. 343). Greyhound's General Traffic Manager frankly admitted that in assigning equipment it would be influenced by the amount of business it was obtaining from the different persons who made the requests (Tr. 455-456) and the Commission so found (Appendix A, *infra*, p. A16): "It [Greyhound] concedes that it might be better disposed to the casino which attracts the most patrons and utilizes its service more often, if a decision pertaining to the assignment of vehicles might become necessary."

Greyhound is prepared to render special operations service from the San Francisco Bay area to gambling casinos in Nevada other than Harrah's Club (Tr. 426, 429-431), and at the time of the hearing was furnishing such special operations service to the Nevada Lodge (Tr. 431-433). Greyhound is similarly prepared to handle all of the interstate charter business tendered it in its territory (Tr. 437). As expressed by its General Traffic Manager, it is Greyhound's position (Tr. 438-439) that "We

have so far been able to take care of all of the traffic that has been offered. Nothing has come up to indicate that we will not continue to be in a position to take care of that traffic." So far as Greyhound is concerned from the viewpoint of public convenience and necessity, it sees no need for any other bus operations to be certificated on any of its routes (Tr. 439).

The record shows that Greyhound was able to take from Peerless the business formerly originating at the Cable Car Restaurant in Santa Clara (Tr. 271, 380-381, 430-431), as well as the business to the Nevada Lodge casino (Tr. 431-432). Greyhound's effort to get Peerless' business to the Mint Club in Reno was unsuccessful (Tr. 436-437), while Peerless succeeded in edging out Greyhound for the traffic to the Silver Spur Casino in Carson City (Tr. 426-429).

About half of Peerless' operating revenue is derived from its regular operations, and about half from its special operations here in issue (Tr. 311-313).

D. Special operations and charter operations

The distinction between special operations and charter operations was stated by Greyhound's General Traffic Manager as follows (Tr. 406):

> "Special operations • • • is an operation over authorized routes between authorized fixed termini, performed on an individual fare basis pursuant to regulations or rules generally published in special tariffs which set up certain special features, such as the exclusive occupancy of the bus, minimum number of fares for which such exclusive occupancy is given, or any other special feature, or some other special features as may be occasioned. • • •
>
> "Charter operation is an occasional irregular transportation of a group of persons traveling together pursuant to a common cause and/or a common interest under an individual contract. The charges are based

on a fixed amount for the chartering of the bus, and the contract is executed between the chartering party and the carrier."

Peerless in the present application proceeding sought authority for special operations to remove the cloud on its charter operations to Nevada because of the individual solicitation features previously noted (Tr. 305-308, 317-321).

In the case of the Cable Car Restaurant in Santa Clara, which Greyround refused to serve on a charter basis (Tr. 383-384), according to Greyhound because of the element of individual solicitation (Tr. 429-430, 452), it appeared that the patrons were organized into a social group known as the Stein Club (Tr. 380). Upon learning at the hearings of the existence of this organization (Tr. 454), Greyhound's General Traffic Manager said (Tr. 454) that if it "was really a club and not just a group of patrons of his bar who signed up on a slip as they dropped in from time to time for a drink, I would say that it could be a legitimate charter."

E. Disposition of Peerless' application

The Commission's Examiner recommended rejection of Peerless' application, relying substantially on the circumstance that its relationship with Travis was so illegal as to cast doubts on its fitness. The Examiner said:

"In the examiner's opinion, the evidence does not warrant a grant of the authority requested herein. The witnesses supporting the application demonstrate a preference rather than a real need for applicant's proposed service. None of them has indicated any material dissatisfactions with Greyhound, which has been serving their specific needs for a number of years. Protestant actively solicits this business, and the number and variety of trips and services offered to the public is, in the examiner's view, positive evidence of its interest in such traffic. It should be noted also

that this carrier has rejected all requests of bogus charter groups and makes a continuing effort to operate lawfully. Applicant on the other hand, appears to have a rather flagrant disregard of the Commission's regulations, for it is all too clear that the manner of soliciting and assemblying these charter tours by a person not a broker, and the frequency and regularity of such tours removes them from the realm of incidental charter operations permitted in section 208(c). Such activities raise grave doubts as to applicant's fitness, in any case, to receive an enlargement of its existing certificated authority."

The Commission rejected Peerless' application, but on different grounds; it considered the traffic theretofore carried by Peerless, which Peerless by its application sought to bring under the "special operations" rubric as a "new competing service" from which Greyhound should be protected. It said (Appendix A, *infra*, pp. A16-A17):

"While we have frequently given consideration to past operations in determining a public need for the continuance thereof, such operations even though conducted under a 'color of right' are not controlling of the issues of public convenience and necessity. The great bulk of applicant's operations to and from Nevada were conducted to and from two casinos only, the Wagon Wheel at Stateline and the Horseshoe Club at Reno. Significantly, these are the only casinos in respect of which applicant produced supporting witnesses, and much of the other testimony submitted concerns these two casinos. However, mere assertions that the proposed service is required to meet the supporting witnesses' transportation needs are not sufficient to warrant a grant of authority therefor, where, as here, no showing is made that such witnesses have attempted to use the existing service available or have found such service to be inadequate in some material respect. Greyhound's refusal to participate in operations which are considered by it to be unlawful, does not establish that it is unwilling or unable to handle all authorized traffic tendered to it. There is nothing to indicate that Greyhound gives preferential treat-

> ment, and it appears willing and able to adapt its service to the public's needs. Existing carriers generally are entitled to all traffic that they can handle economically and efficiently within the scope of their operating authorities, and unless it can be shown that such carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories, no new competing service should be authorized. No such showing has been made here, and we agree with the examiner that the application should be denied."

The present action was brought after the full Commission denied Peerless' petition for reconsideration and rehearing.

The court below sustained the Commission's order, on the ground that (Appendix B, *infra*, p. A18) "the Interstate Commerce Commission applied the proper standard in determining whether or not there was a present or future convenience and necessity for granting complainant a license expanding its activities and in the application of said test properly concluded that there was no showing that the existing service was not adequate."

As has been indicated, the only question on this appeal is whether the Commission did indeed follow proper standards.

THE QUESTIONS ARE SUBSTANTIAL

In this case Peerless, impaled on the distinction between charter operations, which it was authorized to conduct, and special operations, which it was not—and, as pointed out below, the Commission virtually from the outset rejected a proposal to define the two separately in its regulations—Peerless sought to regularize its position by applying for authority to handle the same traffic as special operations. The Commission, however, has held that Peerless with its 45 buses, which carried some 32,000 persons over the routes in question during a 15-month period as

"charter" passengers may not now transport such customers as "special operations", because the existing carrier, Greyhound with its 747 buses, requires protection against "new competing service"—this under the rule that the burden of proof is on the applicant for a new certificate—and because Greyhound "[is] entitled to all traffic that [it] can handle economically and efficiently."

We think that in treating Peerless' existing traffic as "new competing service" when that service was sought to be conducted under a different heading, the Commission applied an erroneous standard; and we submit that the record in the case demonstrates without contradiction that the Commission compounded its error to the extent of condoning discrimination, condoning participation in rebating—after all, the refund stub to be presented at Harrah's Club is handed the passenger by a Greyhound ticket agent at a Greyhound ticket window—and of approving transportation practices under which Greyhound is actively fostering the business of the larger gambling casinos at the expense of the smaller ones.

First. It is not disputed—nor can it be, inasmuch as the uncontradicted evidence comes from the mouth of Greyhound's General Traffic Manager—that Greyhound in its San Francisco and other Bay area terminals sells special tickets printed by Harrah's Club that entitle the passenger to (1) transportation to Nevada, (2) return transportation to the Bay area, and (3) a refund ticket to be presented to and cashed by Harrah's Club for whatever refund which that gambling casino cares to make (Tr. 441-442). Thus Greyhound participates in rebating, because its own ticket agents deliver a stub that entitles the Harrah's Club customer to a refund from the tariff price. No other casino, obviously, is going to honor that stub. Consequently, Greyhound is, in addition, aiding the business of Harrah's Club, at the expense of the latter's competitors in the gambling casino business.

Second. The record shows, also without contradiction, that whereas Greyhound charges the Harrah's Club patrons only $6.77 plus tax on "special operations" (Tr. 450-451), it quoted the Wagon Wheel, a competitor casino across the street from Harrah's Club (Tr. 326, 378), a fare of $8.80 plus tax (Tr. 420, 450, 451). This discrimination was freely admitted by Greyhound's General Traffic Manager (Tr. 451).

Similarly, Greyhound assigns better vehicles to its Harrah's Club trip (Tr. 343), influenced by the larger amount of business that casino generates (Tr. 455-456), as indeed the Commission found (Appendix A, *infra*, p. A16, also quoted above at p. 9).

We had supposed that the very object of the Interstate Commerce Act was to eradicate just this sort of discrimination, and yet the crass favoritism appearing in this record has been approved by the Commission with the sanction of the court below, under the guise of holding that the author of the discriminations just specified must be protected from Peerless' alleged "new competing service."

Third. The Commission's partiality to Greyhound is further apparent when its report (Appendix A, *infra*, pp. A1-A17) is laid against the record. In discussing Peerless' operations and the activity of Travis, the Commission speaks of "gambling excursions", mentions "gambling casinos" eleven times by actual count, "casinos" eighteen times, and "casino" on seven occasions. Greyhound, on the other hand, is linked to casinos three only times and then just incidentally: there is mention that "a competing casino, in the adjoining building to the Wagon Wheel, advertises in Greyhound's terminal" in San Francisco (Appendix A, *infra*, pp. A-14-A15); that Greyhound "represents that the same type of service is available to any of the casinos in Nevada" (Appendix A, *infra*, p. A15-A16); and that it "conducted a number of special operations for one of the restaurants supporting the in-

stant application to a casino in Carson City" (Appendix A, *infra*, p. A16).

No reader of the Commission's report will learn from examining that document that Greyhound for over 9 years has actively solicited "special operations" movements between points in California and the gambling casinos in Nevada (Tr. 416-417), or that Greyhound sells special Harrah's Club tickets containing a refund coupon (Tr. 441-442) from a special ticket window in the Greyhound terminal marked "Hurrah's Club" (Tr. 444), or that Harrah's Club and the Nevada Lodge have rent-free booths in several of Greyhound's terminals (Tr. 444-446, 448). Every one of those facts was testified to by Greyhound's General Traffic Manager, yet not one of them appears in the Commission's report.

In thus failing to disclose that some of Greyhound's Bay area bus terminals are virtually California annexes of Harrah's Club, the largest gambling casino in the Lake Tahoe area (Tr. 451) and perhaps the largest in Nevada (Tr. 326), while at the same time it was constantly linking Peerless to the casinos, the Commission made all too evident where its sympathies lay.

Thus, just as in *Interstate Commerce Comm.* v. *J-T Transport Co.*, 368 U. S. 81, 90, the Commission "has loaded one of the scales"—although perhaps in a somewhat more subtle way.

Fourth. When the Commission in 1941 first adopted its regulations governing "Special and Chartered Parties", it specifically rejected the separate definitions of "special party" and "chartered party" then proposed, see *Regulations Governing Special or Chartered Party Service*, 29 M. C. C. 25, 32 (Proposed Rule II), and the two terms are still not separately defined, either in the existing regulations (49 CFR § 178.2; *infra*, p. A21), or in the statute,

Section 208(c) of the Act (*infra*, p. A20).[3] It is true that numerous Commission rulings revive and formulate the distinction between charter and special operations (e. g., *Tauck Tours, Inc., Extension—New York, N. Y.*, 49 M. C. C. 491, 496, and cases there cited), though it is hardly to be supposed that every small carrier can maintain a set of *Motor Carrier Reports* to ascertain whether the Commission gives effect in its current rulings to a distinction it advisedly refused to assert in its regulations.

In practice, the difference is thin enough, as the case of the Stein Club in the Cable Car Restaurant at Santa Clara (*supra*, p. 11) indicates: if the patrons are "really a club" they can charter a bus and Peerless can carry them under its existing incidental charter authority. If, however, they are "just a group of patrons of his bar," then they can travel only under the special operations authority that Greyhound has and that Peerless sought but was refused because the Commission ruled that Greyhound was to be protected from "new competing service". Significantly, however, the Commission did not rest its refusal of Peerless' application on the ground, recommended by the Examiner (*supra*, pp. 11-12), that Peerless' failure to appreciate all of the nuances separating charter operations from special operations amounted to "a rather flagrant disregard of the Commission's regulations." But the Commission did so far hold Peerless to the distinction as to consider its regularized service to involve new rather than existing competition, and thus to insure Greyhound's virtual monopoly of the transportation business—and to insure as well approval of Greyhound's continuing to act as shill for Harrah's Club.

Fifth. In the present case the evidence plainly shows that the existing traffic will in fact support both services.

[3] The 1948 amendment to the regulation, see 48 M. C. C. 521, does not bear on the present problem.

If Peerless' application is denied, then that carrier stands to lose about half of its revenue (Tr. 311-313). Contrariwise, if the application is granted, Greyhound, already a very large carrier, is the gainer, so that the factual situation noted in *Interstate Commerce Comm.* v. *J-T Transport Co.*, 368 U. S. 81, 93, will be repeated: "* * * where the protesting carriers do not presently have the business, it would seem that the grant of it to a newcomer would have an adverse effect upon them only in the unusual case."

Of course Peerless is not in fact a newcomer to the traffic that it here seeks to carry under a different classification. Of course the *J-T Transport Co.* case involved contract carriers under Section 209(b) of the Act while the present one is concerned with special or chaterered parties under Section 208(c). But the Commission's consistent inclination in favor of the larger carriers, and its preference for regulated monopoly over regulated competition, appear unmistakably in both.

We are not unaware that the usual effort to seek review of motor carrier rulings in this Court does not survive the inevitable motion to affirm, even when, as here, initial review by the three-judge court is couched in the simple conclusory terms that are the normal hallmark of perfunctory scrutiny.

Here, however, the Commission applied an erroneous standard, labeling substantial existing traffic as "new competing service." And, applying that erroneous standard, the Commission is shown on this record to have condoned discrimination and to have condoned actual participation in rebating, while its report, which consistently associates the appellant Peerless with the gambling casinos, studiously fails to disclose that the larger and favored carrier, Greyhound, effectively discriminates in favor of the larger gambling casinos and has in addition turned a number of its largest bus terminals into virtual branch offices of those enterprises.

It may be that such a shocking result necessarily flows from the terms of the Motor Carrier Part of the Interstate Commerce Act and from the limited scope for judicial review thereunder. But we would be reluctant to arrive at such an essentially defeatist conclusion until and unless the holding below has first been approved after plenary consideration by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Court should note probable jurisdiction of the present appeal.

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JULY, 1962.

APPENDIX A

REPORT OF THE INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION

No. MC-C-2548[1]

PEERLESS STAGES, INC., INVESTIGATION AND REVOCATION OF CERTIFICATE

Decided May 11, 1961

1. In No. MC-C-2548, respondent Peerless Stages, Inc., found to be and to have been engaged in certain unauthorized operations in violation of section 206(a) of the act, and in violation of the rules and regulations prescribed under section 208(c) of the act; respondent Joseph Travis found to have participated in such violation; and respondent Travis found to be and to have been engaged in operation as a broker in violation of section 211(a) of the act. Cease and desist order entered as to respondents Peerless Stages, Inc., and Joseph Travis and proceeding discontinued as to respondent John Larry Parsons, Jr.

2. In No. MC-66505 (Sub-No. 3), public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle of passengers, in round trip special or charter operations, beginning and ending at points in a specified area in California and extending to points in four States, over irregular routes. Application denied.

[1] This report also embraces No. MC-66505 (Sub-No. 3), Peerless Stages, Inc., Extension—Special and Charter Operations.

Pete H. Dawson, Spurgeon Avakian, and *H. Helmut Loring* for Peerless Stages, Inc.

Scott Elder for Joseph Travis and John Larry Parsons, Jr.

Gerald H. Trautman and *William W. Schwarzer* for The Greyhound Corporation.

Arthur Glanz for Trancontinental Bus System, Inc., and American Buslines, Inc.

Ellis Gregory and *William L. Harrison* for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND HERRING

BY DIVISION 1:

These proceedings were heard on a consolidated record, involve related issues, and will be disposed of here in a single report. Exceptions to the recommended order of the joint board in the title proceedings were filed by Peerless Stages, Inc., hereinafter called Peerless, and Joseph Travis, and by Peerless to the recommended order of the examiner in the embraced application proceeding. In each instance, The Greyhound Corporation, hereinafter called Greyhound, and our Bureau of Inquiry and Compliance, hereinafter called the Bureau, replied.

By order entered March 16, 1959, we entered upon an investigation, on our own motion, under authority of sections 204(c) and 212(a) of the Interstate Commerce Act and section 2 of the Elkins Act, to determine (1) whether Peerless is engaged in the transportation of passengers, in interstate or foreign commerce, as a common carrier by motor vehicle in violation of sections 206(a) and 208(c) of the act, and our regulations implementing the latter section governing the performance

of special or chartered party service, prescribed in *Regulations, Special or Chartered Party Service*, 29 M.C.C. 25 and 48 M.C.C. 521, hereinafter called the regulations, (2) whether Joseph Travis and John Larry Parsons, Jr., in concert with Peerless, have been and are participating in the aforementioned violations, and (3) whether Travis and Parsons are and have been engaged in the business of a broker in violation of section 211 of the act. The order names Peerless, Travis, and Parsons as respondents. Appearances were entered on behalf of respondents, the Bureau, and Geryhound.

By application filed December 3, 1958, as amended, in No. MC-66505 (Sub-No. 3), Peerless seeks a certificate of public convenience and necessity, authorizing operations, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of passengers, in special or charter operations, beginning and ending in that portion of California north of the northern boundaries of San Luis Obispo, Kern, and San Bernardino Counties (except those in El Dorado and Placer Counties), and extending to points in Nevada, Arizona, New Mexico, and Utah. The application is opposed by Greyhound; and the Bureau, Transcontinental Bus System, Inc., American Buslines, Inc., Travis, and Parsons intervened.

Peerless conducts regular-route, scheduled passenger operations over a network of highways extending from Oakland, Calif., south to Santa Cruz, Calif., generally on or parallel to California Highway 17, with a branch extending westward to Palo Alto, Calif., under a certificate issued by this Commission in No. MC-66505 in 1942. The motor operations which are the subject of these proceedings, however, consist of the transportation of persons by Peerless from points in the San Francisco Bay area to the locations of certain gambling casinos situated in Nevada near the California State line in the Reno-Carson City-Lake Tahoe area. Peerless does not hold specific

authority from this Commission to perform this service, but claims the right to do so under the incidental charter privileges afforded regular-route carriers under the provisions of section 208(c) of the act. Travis solicits patrons for these gambling excursions and this forms the basis for his involvement in the proceedings. Parsons is an employee of Travis.

The Investigation

In the title investigation the board found (1) that the groups of persons transported by Peerless from points in the San Francisco Bay area to the Nevada gambling casinos do not qualify as special or chartered parties under section 208(c) of the act and our rules and regulations thereunder; that the service so rendered lacks the attributes of a bona fide charter service; and that the operations performed have been and are unauthorized and unlawful, (2) that Travis has been and is participating in such unlawful operations, (3) that Travis has been and is engaged in operation as a broker of transportation of passengers in violation of the provisions of section 211(a) of the act, (4) that an order should be entered requiring Peerless and Travis to cease and desist from such violations, and (5) that Parsons is not participating in the violations of Peerless, is not engaged in operation as a broker of transportation without authority, and that an order should be entered discontinuing the proceeding as to him.

On exceptions Peerless takes issue with all of the conclusions of the board except those described in (5) above. It contends that its transportation of groups of persons to and from the gambling casinos is a legitimate exercise of the incidental charter privileges bestowed by section 208(c); that its vehicles are chartered by the casinos, which pay its established charter rates; that it has no dealings with the passengers, either on a group or an

individual basis; and that in assembling the various groups, Travis is merely acting as an agent of the casinos and hence is exempt from the brokerage provisions of section 211. The separate exceptions of Travis are of the same purport. He emphasizes the fact that no arrangements are made between the carrier and the passengers, and he construes the provisions of section 178.6(b) of the regulations, which prohibit carriers from transporting "passengers with whom separate and individual transportation arrangements have been made" to refer only to arrangements between the carrier and the passenger. He argues that any other construction placed upon the regulations is contrary to law and invalid. He does not object to the board's recommendation that the proceeding be discontinued as to Parsons.

In their replies, the Bureau and Greyhound urge that the conclusions of the board are adequately supported by the record and the applicable law, and should be approved. They say that Peerless may take advantage of the provisions of section 208(c) of the act only upon compliance with the regulations and that the operations being performed violate both the letter and spirit of such regulations and the decisions of the Commission and the courts relating thereto. Rejecting the theory that the persons traveling in Peerless' vehicles to and from the casinos constitute a group of persons with a common purpose, they insist that Peerless is, in fact, merely transporting individual passengers for compensation. Both replicants vigorously contest the claim that Travis is an agent of the casinos, pointing out that he operates an independent travel agency, dealing independently with the casinos, Peerless, and the passengers, and comes squarely within the provisions of section 211 requiring a broker's license in respect of his activities.

There is no serious dispute as to the facts. The statement of facts in the board's report is accurate in all

material respects, and, as supplemented herein, we adopt such statement as our own. For clarity of discussion the basic facts will be restated briefly.

Certain gambling casinos at Reno, Carson City, Crystal Bay, Stateline, and Lake Tahoe, Nev., have a policy of offering free transportation to patrons or prospective patrons desiring to visit their establishments and take advantage of their facilities. The recruitment of these patrons is handled in the San Francisco Bay area by Travis, who operates a travel bureau known as Town and Country Travel Agency, and by Jeanette's Town and Country Travel Agency (in which Travis has no proprietary interest). Travis advertises extensively in the bay area, offering free transportation on a daily basis to and from the casinos. Patrons desiring to take advantage of the offer make arrangements with Travis for reservations. When a sufficient number of reservations have been recorded, Travis orders a bus from Peerless and arranges for the pickup of the patrons at one or more designated points. If there is sufficient room in the bus at time of departure, casual pickups are accepted without reservations. The buses leave the bay area at specified times in the morning and evening, proceed to the appropriate casino, and, after a stay of approximately eight hours, return to point of origin. The trips have been exceedingly popular. During the period January 1, 1958, to March 15, 1959, Peerless made 892 trips to the casinos, transporting 32,320 passengers, with business picking up substantially after July 1, 1958, when its service supplanted a similar service previously provided by American Buslines, Inc., which because of a labor dispute was forced to suspend operations.

Peerless receives a single charge from the casinos for each bus load of patrons delivered thereto based upon its published tariffs. Travis is compensated by the casinos at the rate of so much a person, which amount is deter-

mined in advance of the undertaking. Travis also appears to receive a commission for travel patrons obtained by Jeanette's; and, until recently, he received a commission from Peerless in respect of the revenues received by it. Generally, the patron does not purchase a ticket, as such, but one of the casinos has adopted a requirement that the patron purchase, prior to departure from the bay area, a so-called "Fun-Package", the cost of which is refunded in the form of food, drink, and other benefits after his arrival at the casino, thus insuring that he will patronize the casino paying for the transportation.

We believe that the activities of Travis in assembling groups of passengers which are to be transported in buses chartered by him for that purpose are those of a broker as defined in section 203(a)(18) of the act. This section provides:

> The term "broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation.

Travis has been in the travel bureau business for a number of years. He maintains establishments at San Francisco and Oakland and has a staff of his own employees to handle inquiries and reservations. He advertises extensively under the names "Town and Country Travel Agency", offering free round trips daily both by bus and by airplane to the Nevada casinos. He holds himself out to provide transportation to the casinos and makes all of the arrangements therefor, including the ordering of the buses from Peerless, the specification of the time and

place of pickup, and the cancellation of trips when an insufficient number of passengers are obtained. He bargains with the casino operators as to his compensation for each patron of the trips, and, until recently, he received a commission from Peerless in respect of the business turned over to it. We think, therefore, that Travis' operations fall squarely within the provisions of section 211(a) of the act, and that he requires a brokerage license to engage in such activities.

Respondents, however, argue that Travis is merely the agent of the casinos, and they liken his situation to that of a shippers' agent in the field of freight transportation, citing *ICC* v. *Chicago Food Manufacturers Pool Car Group*, 39 F. Supp. 283, as authority for the proposition that shippers' agents are not brokers. In that case, the individual involved was employed by a group of shippers at a fixed salary on a full-time basis and was not, as in the case of Travis, an independent intermediary operating on his own and dealing at arm's length with the casinos, Peerless, and the gambling patrons alike. Every broker, even though engaged as an independent volunteer for profit, is in a sense an agent for one or more of the parties to the transaction which it arranges. *Tauck Tours, Inc., Extension—New York, N. Y.*, 54 M.C.C. 291, 299. For a person who arranges transportation to be a bona fide agent of one of the parties to the transaction (here, either Peerless or the casinos), the agency must be "such an exclusive and continuing arrangement as to clothe the agent with virtually the status of an employee." 54 M.C.C. at 296. Such a relationship normally would be characterized by a lack of independence on the part of the agent, who would ordinarily be expected to act exclusively for his principal or employer. A broker, on the other hand, is essentially a middleman or intermediary, and it is into this category that Travis clearly falls. We conclude that Travis, in arranging for and procuring transportation subject to the act, is engaged in operations as a broker,

and that he requires a brokerage license for the continuance of such activities.

As for Peerless' share in the challenged operations, we think it clear that in accepting and transporting groups of passengers assembled by Travis, who is neither a licensed broker nor a bona fide agent of the casinos, it acted unlawfully. The casino trips constitute a substantial business, involving the transportation of over 32,000 passengers in a 15-month period, and we believe that Peerless properly may be charged with the duty of determining whether the groups it transported were assembled and that the transportation it furnished was contracted for in a lawful manner. Remaining to be determined is whether as found by the board, the evidence before us warrants a finding that the groups of persons transported by Peerless are not special or chartered parties within the meaning of section 208(c) and our regulations thereunder, or that the operations performed do not constitute charter service.

As heretofore indicated, Peerless holds no specific authority to perform special or chartered operations, and the question for determination here is whether it may operate as it has been doing under the provisions of section 208(c) of the act, which provides as follows:

> Any common carrier by motor-vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

As noted earlier, such rules and regulations were prescribed in the *Regulations* case, and are codified in 49 CFR 178.1 to 178.6 inclusive. It is clear, therefore, that any carrier seeking to take advantage of the operating privileges accorded by section 208(c) may do so only upon

compliance with the rules and regulations prescribed by this Commission thereunder. And obviously, this proceeding is not the proper forum for a collateral attack upon the validity of these regulations, as suggested by respondent Travis.

The rules established in the *Regulations* case, although entitled regulations governing *special* or chartered parties, do not envision the performance of what are referred to as "special operations" as contrasted to "charter operations". The distinction between these two types of passenger service has been noted many times. Briefly, charter service entails the provision of transportation for a group, assembled by someone other than the carrier, which contracts for the exclusive use of a bus for the duration of a particular trip or tour. Special service contemplates that service, rendered usually on special occasions, in which the carrier itself has assembled a number of passengers into a travel group by the sale to them of individual tickets covering a particular trip or tour planned or arranged by the carrier. *Fordham Bus Corp. Common Carrier Application*, 29 M.C.C. 293. The charter rules, 29 M.C.C. at pages 47-48, define a special or chartered party as—

> • • • a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the origin.

It was found in the *Tauck Tours* case, *supra*, that unless passengers are assembled and transportation arranged for by a licensed broker, the membership of a bona fide

charter group must be determined in advance; and the group must arrange for the chartering of vehicles, pay the transportation charges, and control the journey. This is not, of course, to say that the group as a whole must contract with the carrier, or act in all ways as a unit. Plainly, a spokesman for a group of passengers may charter a bus. An employer, for example, might charter several vehicles for an employee picnic, without knowing in advance the names of the persons or the exact number of persons who would ultimately use the buses, and the group assembled to travel to the picnic would constitute a bona fide charter party. However, even this degree of prearrangement of the membership of the group to be transported is lacking in the operation as presently conducted by Peerless. Therefore, only if the group were one arranged by a licensed broker or by a bona fide agent or employee of the casino could it be said to be a charter party within the meaning of the charter rules. In this respect it should be noted that an employee of the casino could perform a service somewhat similar to that which could be provided by a licensed broker, so long as he did so only on his employer's behalf, received no compensation from the carrier or passengers, and was not paid by his employer directly for his efforts in arranging transportation. *Snodgrass Broker Application*, 76 M.C.C. 739. If the group were so arranged, we believe that Peerless could lawfully transport it under its incidental charter authority, that is, assuming that it met the other requirements of charter service.

The board found that the service Peerless performs has been provided on a regular schedule in violation of the charter rules. Rule VI provides, as pertinent:

> Limitations of service.—No common carrier of passengers by motor vehicle subject to these rules shall transport special or chartered parties, as herein defined, between the same points or over the same

route so frequently as to constitute a regular scheduled or nonscheduled service.

We do not believe, on the evidence before us, that the mere popularity of the challenged operations and the number of trips performed by Peerless justifies the conclusion that this service has become a scheduled service such as would be inconsistent with the nature of bona fide charter operations. It should be noted, however, that frequent service between much the same points ordinarily tends to become more and more regular in character. Peerless is cautioned that such a tendency must be avoided if the essential characteristics of charter operations are to be maintained. Compare *Rester* v. *Hunter Clarkson, Inc.*, 41 M.C.C. 665.

We conclude that the motor-carrier operations of Peerless, as conducted, in the transportation of persons from points in the bay area to gambling casinos in Nevada, and return, do not constitute the transportation of "special or chartered parties", as that term is used in section 208(e) of the act, and that such operations are in violation of the rules and regulations prescribed by the Commission thereunder. We further conclude that since such operations do not fall within the purview of section 208(e), they are in violation of section 206(a) of the act. We further conclude, that Travis, in concert with Peerless, has and has been participating in such violations.

The Application Proceeding

By this application Peerless seeks specific authority, under the provisions of section 207 of the act, to continue operations to and from the gambling casinos in the manner heretofore outlined. The examiner found that public convenience and necessity do not require the proposed operations and recommended that the application be denied. On exceptions Peerless claims that the examiner's

recommendation was influenced by what he considered to be flagrant violations in its present operations of our charter rules and regulations and that he considered such conduct not only to cast doubt upon applicant's fitness but also to warrant disregarding such operations as evidence of a public need for the continuance of the proposed service. It argues that the testimony of the persons supporting the application and its past substantial operations warrant the conclusion that the transportation needs of the Nevada casinos and their prospective patrons can be met only by the authorization of at least one other carrier to compete with Greyhound for this business; that the creation of a competitive situation would be in the public interest and lead to better service; and that Greyhound would not seriously suffer by such action.

In reply Greyhound urges that the examiner's recommendation is abundantly supported by the record and should be adopted. It points out that the examiner gave due consideration to applicant's past operations together with the testimony of the public witnesses and concluded that no substantial need existed for the proposed service. Both Greyhound and the Bureau support the examiner's conclusions concerning applicant's fitness, the former urging that applicant should not be rewarded for consistent unlawful past operations, and the latter stressing the importance of fitness and applicant's poor record of compliance.

The evidence adduced, the examiner's recommendation, the exceptions, and the replies thereto have been considered. We find the statement of facts in the examiner's report to be substantially correct, and, as hereinafter supplemented, we adopt such statement as our own. No evidence was submitted concerning the proposal to originate traffic at points in California other than those in the bay area nor the proposal to serve points in Arizona, New Mexico, and Utah, and no further consideration will be given to those phases of the application.

Applicant owns and operates approximately 45 buses, 12 of which are used in its regular-route operations, with the remainder being available for the operations here proposed. It has a terminal at Santa Cruz, and utilizes Greyhound's terminal facilities at Oakland and San Jose. The operations which are the subject of this proceeding are the same as those heretofore described in the investigation proceeding, namely the transportation of persons from points in the bay area to gambling casinos in Nevada, and return. From November 1958 through March 1959, it conducted 335 trips from points in the bay area to gambling casinos at Reno, Carson City, Stateline, Crystal Bay, and Lake Tahoe, transporting some 11,800 persons and realizing revenues in excess of $79,000. Most of these persons were assembled by Travis, who arranged for their transportation to and from the casinos, free of charge, with the casinos paying the transportation charges and also paying Travis a per-capita amount for his part in the solicitation of patrons for the trips and arranging for their transportation, in the manner heretofore described.

The application is supported by representatives of two gambling casinos in Nevada, an individual, and several business proprietors in San Jose and Santa Clara, Calif. A representative of the Horseshoe Club in Reno desires the proposed service, but has not made any inquiries to determine whether existing service is adequate.

The public relations director at Harvey's Wagon Wheel Club in Stateline is interested in the proposed service to attract potential patrons from the San Francisco, Oakland, and San Jose areas, and such service would be utilized for group charters, and also to transport patrons purchasing individual round trip "packages" which provide for cash refunds, meals, and drinks. He represents that Greyhound's services cannot be used successfully from San Francisco because a competing casino, in the adjoining

building to the Wagon Wheel, advertises in Greyhound's terminal in that city. He also is of the opinion that Greyhound's equipment which might be available to his patrons is inferior to that provided to his competitor. The Wagon Wheel discontinued using bus service on an individual ticket basis about September of 1958.

Four operators of taverns and restaurants in San Jose and Santa Clara arrange trips to Nevada gambling casinos for their patrons and for social clubs which they have organized. The cost of the chartered bus for individuals making up the group is on a pro rata basis. On several occasions Greyhound declined to conduct trips to Nevada. One witness represents that Greyhound requires payment for 33 passengers, and that the proposed service could be utilized without being required to pay for unoccupied seats. Some use applicant's service to the Wagon Wheel where they prefer the entertainment. All are fully satisfied with applicant's service, and express a need for its continuance.

Another person active in civic and business organizations in Santa Clara, occasionally charters buses for group trips to the casinos and desires the continuance of applicant's service. Another, with his wife, prefers to gamble at the Wagon Wheel and utilizes applicant's service approximately twice a month. He represents that if he made reservations for a club, located next door to the Wagon Wheel, he would feel obligated to remain there.

Greyhound is engaged, as here pertinent, in the transportation of passengers over its authorized regular routes in California and Nevada, and is in a position to provide special and charter service to all points in Nevada here involved. It actively solicits special and charter traffic and expresses a readiness, willingness, and ability to meet all the requirements for special and charter transportation in the involved areas. It concurrently conducts special and charter operations and represents that the same type of service is available to any of the casinos in

Nevada. It has between 100 and 150 buses available for such operations and maintains terminals suitable for handling its tours at San Francisco, Oakland, San Jose, and Sacramento, Calif., and Reno, Las Vegas, and Carson City, Nev. It assigns the best equipment available and represents that it does not recall when it did not have adequate buses available for bona fide charter operations. It concedes that it might be better disposed to the casino which attracts the most patrons and utilizes its service more often, if a decision pertaining to the assignment of vehicles might become necessary. It has conducted a number of special operations for one of the restaurants supporting the instant application to a casino in Carson City.

While we have frequently given consideration to past operations in determining a public need for the continuance thereof, such operations even though conducted under a "color of right" are not controlling of the issues of public convenience and necessity. The great bulk of applicant's operations to and from Nevada were conducted to and from two casinos only, the Wagon Wheel at Stateline and the Horseshoe Club at Reno. Significantly, these are the only casinos in respect of which applicant produced supporting witnesses, and much of the other testimony submitted concerns these two casinos. However, mere assertions that the proposed service is required to meet the supporting witnesses' transportation needs are not sufficient to warrant a grant of authority therefor, where, as here, no showing is made that such witnesses have attempted to use the existing service available or have found such service to be inadequate in some material respect. Greyhound's refusal to participate in operations which are considered by it to be unlawful, does not establish that it is unwilling or unable to handle all authorized traffic tendered to it. There is nothing to indicate that Greyhound gives preferential treatment, and it appears willing and able to adapt

its service to the public's needs. Existing carriers generally are entitled to all traffic that they can handle economically and efficiently within the scope of their operating authorities, and unless it can be shown that such carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories, no new competing service should be authorized. No such showing has been made here, and we agree with the examiner that the application should be denied.

Findings

We find in No. MC-C-2548 that the transportation by respondent, Peerless Stages, Inc., of persons from points in the San Francisco Bay area to gambling casinos in Nevada in the manner described herein does not constitute the transportation of "special or chartered parties" as that term is used in section 208(c) of the act and that such transportation is and has been in violation of the rules and regulations prescribed by the Commission thereunder; that such transportation is and has been in violation of the provisions of section 206(a) of the act; and that respondent Joseph Travis is and has been participating in such violations. We further find that respondent Joseph Travis is and has been engaged in operation as a broker of transportation by motor vehicle of passengers without a broker's license, in violation of the provisions of section 211(a) of the act; that an order should be entered requiring said Peerless Stages, Inc., and said Joseph Travis to cease and desist, and thereafter to refrain and abstain, from such violations; and that the proceeding should be discontinued as to respondent John Larry Parsons, Jr.

We find, in No. MC-66505 (Sub-No. 3), that applicant has failed to establish that the present or future convenience and necessity require the proposed operations; and that the application should be denied.

An appropriate order will be entered.

APPENDIX B

ORDER AND JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 40280

PEERLESS STAGES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

THE GREYHOUND CORPORATION, *Applicant for Intervention.*

ORDER OF JUDGMENT

Before: HOMER T. BONE, Circuit Judge, and ALBERT C. WOLLENBERG and ALFONSO J. ZIRPOLI, District Judges.

After reviewing the record in the instant case and after hearing oral argument from counsel, the Court finds that the so-called charter trips of the complainant do not come within the provisions of Section 308(c) Title 49 United States Code;

That Travis was neither an agent of the casino nor a licensed broker and hence the so-called charter trips were unlawful;

That the Interstate Commerce Commission applied the proper standard in determining whether or not there was a present or future convenience and necessity for granting complainant a license expanding its activities and in the application of said test properly concluded that there was no showing that the existing service was not adequate.

Under the circumstances we can find no abuse of discretion on the part of the Interstate Commerce Commission, hence;

JUDGMENT IS HEREBY ENTERED for the defendants sustaining the order of the Commission and the complaint is dismissed.

Dated: May 2, 1962

HOMER T. BONE
United States Circuit Judge

ALFONSO J. ZIRPOLI
United States District Judge

ALBERT C. WOLLENBERG
United States District Judge

[NOTE: This order of judgment was filed in the Clerk's Office on May 3, 1962.]

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

1. Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) provides as follows:

> "**§ 307. Issuance of certificate—(a) Issuance authorized to qualified applicants for regular routes and between fixed termini**
>
> "Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers

by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

2. Section 208(c) of the Interstate Commerce Act (49 U.S.C. 308(c)) provides as follows:

"Transportation of special or chartered parties

"(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

3. Part 178 of 49 C.F.R., Special or Chartered Parties by Common Carriers, provides in pertinent part as follows:

"§ 178.1 Applicability of this part.

"(a) The regulations in this part shall apply to all common carriers of passengers authorized by section 208(c) of the Interstate Commerce Act, to transport special or chartered parties as an incident to the right to engage in the transportation of passengers by motor vehicle in interstate or foreign commerce over a regular route or routes and between fixed termini, whether such regular-route operation is authorized by a certificate of public convenience and necessity issued by the Commission, under the first proviso of section 206(a) or under section 207(a) of the Interstate Commerce Act.

"(b) The regulations in this part shall not be applicable to common carriers of passengers authorized by a certificate of public convenience and necessity to perform special or charter operations or both, within a specified territory or from, to, or between specific

points under the provisions of the first proviso of section 206(a) of the act, or under the proviso of section 207(a) thereof, which specific operations shall be limited strictly to the authority described in the certificate of each carrier so engaged.

* * * * *

"§ 178.2 Definitions.

"(a) The term 'special or chartered party,' as used in the regulations in this part, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

"(b) The term 'regular route or routes,' as used in the regulation in this part, means the specific highway or highways over which a motor coinmon carirer of passengers is authorized to operate between fixed termini.

* * * * *

"§ 178.6 Limitations of service.

"(a) No common carrier of passengers by motor vehicle subject to the rules in this part shall transport special or chartered parties, as defined in this part, between the same points or over the same route so frequently as to constitute a regular scheduled or non-scheduled service.

"(b) No common carrier of passengers by motor vehicle subject to the rules in this part shall transport passengers to whom individual tickets have been sold or with whom separate and individual transportation

arrangements have been made (1) from or to any point or points except those upon its regular route or routes or authorized to be served as off-route points, or (2) over any route or routes other than those so authorized to be served by such carrier. The transportation of any passengers under any such arrangements by any such carrier to or from any point or points not on the regular route or routes of such carrier or to or from any point not authorized to be served as an off-route point, or over any route or routes other than those authorized to be served by such carrier, except as a member of a special or chartered party as herein defined, is not authorized and is hereby forbidden. The provisions of this paragraph shall not be construed as restricting in any way special or charter operations referred to in § 178.1(b).

"(c) No common carrier of passengers by motor vehicle subject to the rules in this part authorized to perform seasonal operations over regular routes may transport special or chartered parties except during the period in which such regular-route operations may be performed."

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SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 262

PEERLESS STAGES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE GREYHOUND CORPORATION,
Appellees.

Appeal from the United States District Court for the Northern District of California

Motion of Appellee, The Greyhound Corporation, to Affirm Judgment

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Motion of Appellee, The Greyhound Corporation, to Affirm Judgment

Appellee and defendant The Greyhound Corporation ("Greyhound") moves the Court pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States to affirm the judgment below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Brief in Support of Motion to Affirm Judgment

QUESTION PRESENTED

Did the Interstate Commerce Commission exceed its jurisdiction in refusing to grant appellant a certificate of public convenience and necessity to operate as a common carrier by motor vehicle of passengers upon the ground that no showing had been made that the existing carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in appellant's Jurisdictional Statement ("Jur. St."), Appendix C.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment entered on May 3, 1962 by a three-judge District Court, specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325, sustaining an order of the Interstate Commerce Commission ("Commission") and dismissing appellant's complaint.

Appellant is a common carrier of passengers by motor vehicle, operating for many years under a certificate of public convenience and necessity issued by the Commission between Oakland, San Jose and Santa Cruz and intermediate points in California. During the year 1958, appellant began large-scale operations from San Francisco, Oakland, San Jose and other points in Northern California to gambling casinos located in Nevada, principally the Wagon Wheel Casino in Stateline, Nevada. Appellant held no certificate authorizing such operations.

The Commission investigated appellant's operations to Nevada and in November, 1958, filed an action in the United States District Court for the Northern District of California to enjoin these operations. The court denied the injunction on the ground that the matters involved could be more effectively determined by the Commission itself. An investigation of appellant's operations was subsequently instituted by the Commission on its own motion. This investigation culminated in a cease and desist order by the Commission against appellant's operations to Nevada. The cease and desist order was upheld by the three-judge District Court and appellant does not challenge the validity of this order before this Court.

In December, 1958, shortly after the Commission started proceedings against appellant, appellant filed an application with the Commission for a certificate to operate as a common carrier between points in California and points in Arizona, Nevada, New Mexico and Utah. At the hearing thereon, the application was amended so as to limit it to operations between the San Francisco Bay Area and the Reno-Lake Tahoe Area in Nevada (Tr. 303, 396-397).

The Commission's examiner recommended denial of the application on December 16, 1959. Exceptions were filed and on May 11, 1961, Division 1 of the Commission denied the application (Jur. St., Appendix A). Appellant's appeal to a three-judge District Court was dismissed on May 3, 1962 (Jur. St., Appendix B).

The only issue which appellant seeks to bring before this Court is the correctness of "the standards applied by the Interstate Commerce Commission * * * in denying the application of the appellant * * *" (Jur. St. pp. 2, 13).

ARGUMENT

This appeal raises only a single issue, to wit, whether the Commission exceeded its jurisdiction in denying appellant a common carrier certificate upon the ground that the existing carriers were adequately serving the public.

Appellant's application was filed under Section 207(a) of the Interstate Commerce Act ("the Act"). (49 U.S.C. § 307(a)) which provides as follows:

> "Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, *if it is found* that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and *that the proposed service*, to the extent to be authorized by the certificate, *is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations." (Emphasis supplied.)

The Commission's task in passing on applications for certificates of public convenience and necessity is now settled beyond controversy. In *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), this Court defined the Commission's role as follows:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. * * * Its func-

> tion is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems." (p. 241; citations omitted.)

And in *United States v. Pierce Auto Lines, Inc.*, 327 U.S. 515 (1946), this Court said:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '* * * the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." (pp. 535-536)

Appellant does not question the sufficiency of the evidence to support the Commission's exercise of judgment in this case, and this should conclude the matter.

In an effort to avoid the impact of the Act and of the uniform line of decisions under it, appellant here seeks to

attack the "standard" applied by the Commission in denying the certificate. Appellant contends that because it had been operating without authority and as the Commission has found, in violation of the Act, it is entitled to the benefits of a special standard, different from that which is applied to other applicants who await a ruling on their application before commencing operations.

The issue raised by appellant is one which the Commission considered (see Jur. St., Appendix A, p. A16) and on it—just as on other matters bearing on public convenience and necessity—the Commission's exercise of judgment is final and binding and not subject to review.

The instant appeal is nothing but a veiled effort to have this Court second-guess the Commission's findings of facts and its exercise of discretion thereon. The motion to affirm should be granted on the foregoing authorities.

Even if there were an issue before this Court respecting the correctness of the standard applied by the Commission, the position taken by appellant is totally lacking in merit.

The standard by which the Commission is guided in ruling upon an application for a common carrier certificate is necessarily controlled by the governing statute. In this case, the statutory standard under Section 207(a) leaves the Commission no alternative but to deny an application for a service which it does not find to be *required* by public convenience *and necessity*.

The standard incorporated in Section 207(a) derives from Part I of the Act (Section 1(18)) which has been in effect since 1920. Section 207(a) was itself enacted in 1935 as a part of the Motor Carrier Act (Part II of the Act). Not only has there been no legislative change in the standard governing the issuance of common carrier certificates throughout the many years during which the Act has been in effect, but the manner in which the Commission has ap-

plied it has remained unchanged throughout numerous reenactments, amendments and revisions of the Act. In an unbroken line of decisions since the enactment of the Motor Carrier Act in 1935, the Commission has denied applications for common carrier certificates upon the grounds herein set forth, i.e. that the existing carriers have not been shown to be unwilling or unable to meet the public's reasonable transportation needs within their authorized territories.* The application of this standard has not only been consistently approved by the courts, *Chesapeake Motor Lines, Inc. v. United States*, 176 F. Supp. 98 (D. Md. 1959), *Filson v. I.C.C.*, 182 F. Supp. 675 (D. Colo. 1960), but the granting of a certificate without an express finding of inadequacy of the existing service has been held to be reversible error by this Court: *Hudson Transit Lines, Inc. v. United States*, 82 F. Supp. 152 (S.D. N.Y. 1948), motion to affirm judgment granted, 338 U.S. 802 (1949); *Inland Motor Freight v. United States*, 60 F. Supp. 520 (E.D. Wash. 1945).

To compel the Commission to depart from this standard —as appellant asks here—would require a profound change

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*See, particularly, *Arco Auto Carriers, Inc., Extension*, 72 M.C.C. 453, 457 (1957) and *Trueman Extension*, 74 M.C.C. 765, 768 (1958); and also, *Bluenose Bus Co. Ltd., Common Carrier Application*, 1 M.C.C. 173, 176 (1936); *Richards, Extension of Operations*, 6 M.C.C. 80, 81 (1938); *Ohio Transportation Co., Common Carrier Application*, 29 M.C.C. 513, 520 (1941); *Royal Cadillac Service, Inc., Common Carrier Application*, 43 M.C.C. 247, 259 (1944); *Brewer, Extension*, 48 M.C.C. 667, 669 (1948); *Black, Extension of Operations*, 48 M.C.C. 695, 711 (1948); *McCullough Transfer Co., Extension*, 49 M.C.C. 121, 125 (1949); *Lehigh Transp. Co., Inc., Extension*, 51 M.C.C. 653, 658 (1950); *W. J. Halloran Trucking Co., Extension*, 52 M.C.C. 749, 751 (1951); *Gilliland, Extension*, 53 M.C.C. 597, 602 (1951); *Pine Tree Transport, Inc., Extension*, 54 M.C.C. 669, 674 (1952); *M&M Fast Freight, Inc., Extension*, 68 M.C.C. 513, 521 (1956); *Thomas Goodfellow, Inc., Common Carrier Application*, 68 M.C.C. 672, 674 (1956); *M&M Oil & Transp., Inc., Extension*, 69 M.C.C. 39, 41 (1956); *Wheelock Bros., Inc., Extension*, 69 M.C.C. 599, 602 (1957); *Bort, Common Carrier Application*, 72 M.C.C. 650, 652 (1957); *Schirmer Transp. Co., Inc., Extension*, 76 M.C.C. 293, 301 (1958); *William F. Crossett, Inc., Extension*, 76 M.C.C. 661, 665 (1958); *Smith, Extension*, 77 M.C.C. 113, 116 (1958).

of regulatory policy, amendment of the Act and rejection of forty years of administration by the Commission.

Appellant's reliance on *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 (1961), demonstrates its lack of understanding of the issues involved here as well as the lack of merit of its position. That case involved the correctness of the standard applied by the Commission in denying a *contract carrier permit under Section 209(b)* of the Act which in relevant part provides as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

Prior to the decision in *J-T Transport Co.*, Section 209(b) had been amended by adding the above-quoted five factors which Congress wanted the Commission to consider in determining whether a permit should issue. The Commission had also proposed to Congress a sixth factor—"that existing carriers are unwilling or unable to provide the type of service for which a need has been shown"—but, upon encountering vigorous objections, withdrew its proposal.

In remanding that case to the Commission, this Court held that by adding the five criteria, Congress directed the Commission to consider not merely the position of protesting carriers but all of the implications raised by the matters referred to in Section 209(b). As this Court put it:

> "• • • as we read the Act, as amended in 1957, the standard is not whether existing services are 'reason-

> ably adequate. It is whether a shipper has a 'distinct need' for a different or a more select or a more specialized service. The protesting carriers must show they can fill that 'distinct need,' not that they can provide a 'reasonably adequate service.'" (pp. 90-91)

The decision in the *J-T Transport Co.* case is significant in demonstrating the difference between the standards applicable under Sections 209(b) and 207(a), respectively. Section 207(a)—and Section 1(18) from which it was derived—has consistently been applied so as to authorize the granting of an additional certificate only if the existing carriers' service has been shown to be inadequate.

Appellant has introduced many irrelevancies into its Jurisdictional Statement such as claims of discrimination and rebating which are not material to the issues before this Court. These claims are not supported by the record, neither are appellant's intemperate and unwarranted attacks on the Commission for its choice of words, for alleged "favoritism" and for allegedly seeking

> "to insure * * * approval of Greyhound's continuing to act as shill for Harrah's Club." (Jur. St. p. 17)

The significant fact about appellant's position, however, is that it does not challenge the sufficiency of the Commission's findings nor of the evidence to support them. Appellant's purported references to the record appear to be intended merely to bring about a departure from the established standard which controls certificate applications (although there is little similarity between appellant's characterization of the record and the record facts). Even if such a departure were permissible under Section 207(a) (which it is not), it would not be justified on this record. Appellant's entire case is pitched on the alleged need of the Wagon Wheel Casino for its own certificated motor carrier in its

competition with Harrah's Club. This seems like a matter far removed from the ambit of the Commission's responsibility under the Act. In any case, the house of cards which appellant tries to construct for purposes of this appeal must fall before the uncontroverted record facts that

(1) The management of the Wagon Wheel knew of no rate concessions by Greyhound to competing casinos and was not aware that Greyhound's tariff in fact makes the same rates available to all casinos at any geographical location (Tr. 338-339, 422, 423);

(2) Greyhound has never refused to place advertising for the Wagon Wheel in its terminals or to make arrangements with the Wagon Wheel comparable to those with other casinos. (Tr. 341, 422-423). Appellant's argument concerning the Wagon Wheel's need for separate terminal facilities is nullified by the record fact that appellant uses Greyhound's terminals (having none of its own) (Tr. 415);

(3) The Wagon Wheel has made no requests whatever for service from Greyhound since February, 1957, because it was able to get service from other carriers for less (Tr. 328-330, 340-341); and

(4) The Wagon Wheel discontinued its bus operations a few months before the hearing because enough passengers from Greyhound's operation to Harrah's Club patronized the Wagon Wheel (Tr. 325-336).

Appellant's emotional appeal reaches its peak when it characterizes the Commission's action as "insur[ing] Greyhound's virtual monopoly of the transportation business * * *" (Jur. St. p. 17). It is always easy and frequently convenient to attack a regulated common carrier as a monopoly, but it is surprising to have the attack come from one such as appellant who, itself a certificated common

carrier over other routes, has surely experienced the competitive inroads of other forms of passenger transportation, particularly the private automobile.* The attack, moreover, comes with ill grace from appellant who, significantly, does not intend to assume the responsibility of operating regular route operations but seeks authority merely to skim the cream by limiting its service to the lucrative high-density casino operations.

CONCLUSION

There is nothing unusual about this case. It is a run-of-the-mill application proceeding, similar in content and manner of disposition to thousands of others handled by the Commission each year. The only thing that may set this case apart is the indefatigable ingenuity of appellant. Nothing in the merits of the case, however, justifies its presence before this Court. For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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Dated at San Francisco, California, August 15, 1962.

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*A substantial amount of competition also comes from carriers certificated over other routes, who, under the provisions of Section 208(c) of the Act, thereby hold incidental authority to perform charter operations to points throughout the United States. Appellant has such incidental authority and is authorized to conduct legitimate charter operations to the Wagon Wheel Casino and elsewhere without limitation.

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No. 268

In the Supreme Court of the United States

October Term, 1956

PHILLIPS PETROLEUM CO., APPELLANT

v.

WISCONSIN ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

[redacted]

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In the Supreme Court of the United States

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No. 262

PEERLESS STAGES, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE GREYHOUND CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission, issued in a consolidated proceeding. The order required appellant to cease and desist from unlawful charter party operations, and denied appellant's application for a certifi-

cate of public convenience and necessity to extend its motor-carrier bus authority to include special or charter operations.

This litigation involves the transportation of passengers from points in the San Francisco Bay area to gambling casinos in the Reno-Carson City-Lake Tahoe area of Nevada. Prior to the instant proceeding, appellant held no specific authority to perform this service, but conducted such operations under color of the incidental charter party provisions of Section 208(c) of the Interstate Commerce Act, 49 Stat. 552, 49 U.S.C. 308(c).[1] On December 3, 1958, appellant applied for a certificate specifically authorizing special or charter operations, over irregular routes, from the Bay area to points in Nevada, Arizona, New Mexico and Utah. On March 16, 1959, before ruling on the application, the Commission instituted an investigation to determine whether appellant was engaged in the transportation of passengers in violation of its outstanding certificate and the incidental charter party provisions of the Act,[2] 49 U.S.C. 306(a) and 308(c). (J.S. App. A, A2–A3).

[1] Section 208(c) provides: "Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

[2] The investigation also inquired into the activities of one Travis and another Parsons, acting as brokers in violation of Section 211 of the Act, 49 U.S.C. 311. Travis was found to be operating as a broker without a license and was ordered to cease and desist. He did not appear as a party to contest the Commission's order in the district court case.

After hearing on a consolidated record, a California and Nevada Joint Board established under Section 205(b) of the Act found that appellant's operations were in violation of Section 208(c) and the regulations issued thereunder, and recommended that a cease and desist order be issued. In the application proceeding, a hearing examiner recommended denial of the certificate on the ground that public convenience and necessity do not require the proposed operations.

On exceptions, Division 1 of the Commission disposed of both proceedings in a single report, adopting the recommendations of the joint board and of the examiner. (J.S. App. A, A2–A17). It held (J.S. App. A, A17), that appellant did not transport "special or chartered parties" within Section 208(c) of the Act but, on the contrary, its operations violated the rules and regulations of the Commission issued under that section and the provisions of Section 206(a). Appellant was ordered to cease and desist such unlawful operations. The validity of the cease and desist provision of the order was sustained by the district court (J.S. App. B, A18–A19), and is no longer contested (J.S. 2, 7–8, 13).

In the application case, the Commission held (J. S. App. A, A16–A17), that appellant "failed to establish that the present or future convenience and necessity require the proposed operations." Rejecting appellant's challenges, the three-judge district court unanimously upheld the order in a per curiam judgment (J.S. App. B, A18–A19). The court concluded that the Commission "applied the proper standard in determining whether or not there

was a present or future convenience and necessity for granting complainant a license expanding its activities and in the application of said test properly concluded that there was no showing that the existing service was not adequate."

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only the Commission's factual determination, affirmed by the district court, that the present or future public convenience and necessity has not been shown to require the proposed operation.

1. Appellant initially complains (J.S. 13, 16, 18) about being treated as a *new* competing carrier and being put to the burden of showing that the existing carrier (Greyhound) is unable, or unwilling, to furnish adequate service. Recognizing that a prospective competitor must establish the necessity for granting a duplicating certificate,[3] Peerless argues

[3] The prospective competitor must show, not only that a proposed service is required in the convenience of the public, but, also, that it is a necessity, which determination turns on the adequacy or inadequacy of existing facilities and service to meet the transportation needs of the public. *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S.D.N.Y.), affirmed, 338 U.S. 802. This standard has been consistently applied by the Commission, with this Court's approval, since the original enactment of Section 207(a) in 1935. See, *e.g.*, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 69; *American Trucking Ass'ns.* v. *United States*, 344 U.S. 298, 312–313; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536; and *United States* v. *Detroit and Cleveland Nav. Co.*, 326 U.S. 236, 241. The ruling in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, specifically limited to contract carrier applications under Section 209(b), is inap-

that this rule was inapplicable in the premises because, unlike the usual applicant, it was not a newcomer to the routes or the traffic, having, in fact, conducted the very operations in question for some considerable time before its application was filed.

'The flaw in appellant's argument is that it would overlook the illegality of the operations sought to be relied on. As already noted, the Commission dedetermined, and the court upheld the ruling, that the Peerless operations between the San Francisco Bay area and the Nevada gambling casinos were authorized by neither Section 207(a) nor Section 208(c) of the Interstate Commerce Act, but, on the contrary, were unlawful, violating Section 206(a) and the Commission's regulations issued under Section 208(c). Having acquiesced in the cease and desist order, appellant cannot now contest that determination. And since, obviously, no carrier can be permitted to gain an advantage through illegal conduct, appellant is foreclosed from invoking past operations to overcome its burden as a prospective competitor.'

Realizing its predicament, Peerless seems to argue that, unlike a flagrant violator who would have no standing to pose as an existing carrier, it is a mere

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posite. That decision was expressly grounded on a recent amendment establishing new and special criteria to control the disposition of such applications.

'This is not to say that appellant's illegal operations must be ignored in determining the need for additional service. The Commission recognized their relevance on this point (J.S. App. A, A16). But, of course, merely because an interloper succeeds in enticing business away from the licensed carrier, it does not follow that two carriers are necessary.

technical offender, now seeking to regularize its existing service, and, accordingly, should not be penalized for past violations. In connection with this contention, appellant complains about the supposed difficulty of appreciating the difference between permissible incidental "special or chartered parties service" authorized by Section 208(c) and the type of operation for which a special certificate is required under the proviso to Section 207(a). It would serve no purpose to repeat all the distinctions. Suffice it to say that the differences, on analysis, are quite clear, and are well recognized in the transportation industry.[5] The Commission's finding that Peerless was engaged in unauthorized operations was based on admitted facts, and its reasoning is fully articulated in its opinion and need not be reiterated here. The plain fact is that appellant cannot acquire standing as an existing carrier on the basis of patently illegal activity.

In denying appellant's application, the Commission found (J.S. App. A, A16–A17) that the existing carrier, Greyhound, holds authority to serve the

[5] The basic distinction between "special or chartered parties service" under Section 208(c) and "special or chartered operations" under Section 207(a) of the Act, is made abundantly clear in the report prescribing the *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 26, 36; in Rule VI thereof, 49 C.F.R. 178.6 (J.S. App. C, A21–A22), and in numerous Commission and court decisions which appellant is presumed to know. *A. B. & W. Transit Co.* v. *United States* (E.D. Va.), 14 Fed. Car. Cases, Par. 81,395, and cases cited; *Crescent Express Lines, Inc.* v. *United States*, 49 F. Supp. 92, 94 (S.D.N.Y.), affirmed, 320 U.S. 401, 406; *National Bus Traffic Ass'n* v. *United States*, 143 F. Supp. 689, 692 (D. N.J.), affirmed, 352 U.S. 1020.

areas in question in regular route scheduled operations as well as in special or charter operations, that it is "willing and able to adapt its service to the public's needs"; and that the witnesses testifying as to the need for appellant's proposed service have not shown that they "attempted to use the existing service available or have found such service to be inadequate in some material respect."

On the basis of its own review of the administrative record, the Court below concluded that the Commission applied the proper standard and was supported by the record. (J.S. App. B, A18). There is no occasion for a second re-examination of that record by this Court. See *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491.

2. Appellant complains (J. S. 14, 15) that the Commission's action, in effect, condones discrimination and rebating by the existing carrier. But these charges have no foundation.

There is nothing in the record indicating that Greyhound discriminates in rates or services between the casinos. Much is sought to be made of the difference between the charge of $8.80 (plus tax) offered to the Wagon Wheel Casino and the $6.77 (plus tax) charge to Harrah's Club. But the simple fact is that the first price covered normal regular route operations and was quoted before special operations, covered by an appropriate tariff, were being run from San Francisco to Harrah's Club (Tr. 420, 421, 422–423, 450–

451).* Since publication of the tariff for special operations, Greyhound has made the same rates available to all casinos at any geographical location (Tr. 338–339, 422–423). In addition, Greyhound will make the same terminal and vehicle facilities available to all casinos (Tr. 341, 422–423, 435, 438, 445, 455–456).

The claim that Greyhound participates in rebating has no foundation in fact. Greyhound collects its total published tariff charge for the service rendered and does not refund any portion to the passengers or the casinos (Tr. 441–442).

3. Finally, appellant alleges (J.S. 15, 17–18) that the Commission favored Greyhound by constantly linking appellant to the gambling casinos; disregarded the economic loss to appellant resulting from denial of the application; and ignored evidence showing that the existing traffic would support both carriers.

The first of these charges is plainly beside the point. In determining the legality of Peerless' past operations, its connection with the casinos was obviously relevant. But there was not the slightest suggestion that those operations were held unlawful *because* they involved transportation to gambling establishments. Nor can appellant properly complain of losing revenue derived from unauthorized service. Termination of unlawful operations does not support a claim that the Commission arbitrarily caused appellant to lose revenue or unlawfully confiscated its property. *United States* v. *Rock Island Co.*, 340 U.S. 419,

* "Tr." references are to the certified transcript of the record before the Commission which has been filed with this Court.

449; *American Trucking Ass'ns.* v. *United States,* 344 U.S. 298, 322–323; *Seaboard Air Line R. R. Co.* v. *United States,* 131 F. Supp. 129, 136 (E.D. Va.), affirmed, 349 U.S. 902. The last complaint presents a purely evidentiary question which the Commission, and the court below, resolved against Peerless. The determination, supported by substantial evidence, presents nothing for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question warranting further review and that the judgment of the district court is correct and should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 262

PEERLESS STAGES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE GREYHOUND CORPORATION

Appeal from the United States District Court for the Northern District of California

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM

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Pursuant to Rule 16(3), appellant files this brief in opposition to the two motions to affirm; the motion filed by the United States and the Interstate Commerce Commission will hereinafter be referred to as "Govt.", the one filed on behalf of Greyhound as "Gill".

I. THE COMMISSION CONDONED DISCRIMINATIONS AND PARTICIPATION IN REBATING ON GREYHOUND'S PART THAT WERE ESTABLISHED BY THE UNCONTRADICTED TESTIMONY OF GREYHOUND'S GENERAL TRAFFIC MANAGER

The present appeal asserts, with full documentation (J. S. 3-19), that the Commission in its preference for the larger carrier — Greyhound — overstepped the limits of impartiality, and condoned serious discriminations as well as participation in a flagrant instance of rebating.

Peerless is not challenging any of the findings set forth in the Commission's report (J. S. App. A2-A17), as appellees seem, however vainly, to hope (GH 9; Govt. 9). Peerless complains, not of the findings that were made, but of the findings that should have been but were not made. The thrust of Peerless' contentions is that the Commission's report conceals, because making no findings upon, material matters testified to without contradiction by Greyhound's own General Traffic Manager, all of which are adverse to Greyhound. (Whether this is an instance of *post hoc propter hoc* is not for us to say.)

The record shows discrimination in rates, discrimination in service, and participation in rebating, as follows:

Discrimination in rates: Greyhound's General Traffic Manager, Hastings, frankly admitted that while Greyhound quoted the Wagon Wheel $8.80 for each passenger as the round trip fare between San Francisco to Stateline, it quoted the competitor casino, Harrah's Club, only $6.77 per passenger for the same trip (Tr. 420, 450, 451). The Commission now says that this was not a discrimination because the first rate was "normal regular route operations" while the second represented "special operations" (Govt. 7-8). But Hastings' testimony quite fails to rest the fare difference on the character of the service (Tr. 451):

"Q. So that when Mr. Hardy [Wagon Wheel's representative, Tr. 322] asked you for the fare to Stateline, you quoted him $8.80, but when you commenced the Harrah's Club operations, you put in a special tariff fare of only $6.77; isn't that true?

"A. That's right."

And neither the Examiner nor the Commission deemed this obvious disparity in rates sufficiently important to warrant mention, much less to attempt to justify it on the ground now advanced by the Commission at Govt. 7-8.

The Commission also argues (Govt. 8) that "Since publication of the tariff for special operations, Greyhound has made the same rates available to all casinos at any geographical location (Tr. 338-339, 422-423)." The quoted record references are instructive. At the page first mentioned, Tr. 338, Hardy of the Wagon Wheel testified to being told by Hastings for Greyhound "that it wouldn't be advisable to operate out of the same terminal" with Harrah's Club. And at the page preceding the second citation, Tr. 421, Hastings admitted telling Hardy that "the Wagon Wheel would come out ahead by starting their service out of some points where Harrah's Club was not operating service." Yet the Commission here asserts (Govt. 7) that "There is nothing in the record indicating that Greyhound discriminates in rates or service between the casinos"!

Discrimination in service: (1) Notwithstanding the denial just quoted from its Motion to Affirm, the Commission in its report admitted Greyhound's discrimination in respect of the better equipment that it furnished the larger casinos: see J. S. App. A16, where the Commission said that Greyhound "concedes that it might be better disposed to the casino which attracts the most patrons and utilizes its service more often, if a decision pertaining to the assignment of vehicles might become necessary." This finding rests on Hastings' admissions at Tr. 455-456.

(2) Greyhound's favoring of Harrah's Club over its Stateline neighbor the Wagon Wheel (Tr. 326, 330, 378) by discouraging the latter from attempting to operate out of the same terminals has already been noted, just above.

(3) The third service discrimination consists in Greyhound's giving two large casinos rent-free booth space in its terminals (J. S. 4, citing Hastings' testimony at Tr. 443, 444, 445-446, 448). It is true that Greyhound expressed formal willingness to permit all other casinos similar privileges (Govt. 8; J. S. 5), but this was expressly qualified by Hastings (Tr. 446), "up to our ability to provide that space." Inasmuch as there are, all told, some 40 casinos involved (J. S. 5), it is obvious that Greyhound's expressed willingness to extend equal booth privileges to all in its terminals is a meaningless expression of generalized goodwill quite impossible to be performed. Even Greyhound's man admitted (Tr. 447) that "I wouldn't judge whether we could put in two or more or ten more."

Participation in rebating: The Commission interposes a blanket denial, saying (Govt. 8):

> "The claim that Greyhound participates in rebating has no foundation in fact. Greyhound collects its total published tariff charge for the service rendered and does not refund any portion to the passengers or the casinos (Tr. 441-442)."

But the Commission's denial is effectively destroyed by the very reference offered to support it; here is what Greyhound's General Traffic Manager testified at the pages cited (Tr. 441-442):

> "The ticket actually reads to Stateline, but the tickets which the passengers who are going to Harrah's Club purchase are a special ticket made up and printed by Harrah's Club which contains coupons for our transportation on our line which read: 'From San Francisco to Stateline' and 'From Stateline back to San Francisco.'

> *"In addition, there is included in this ticket a coupon which is presented by the passenger at Harrah's Club to the cashier for whatever refund they care to make."*

In view of the last paragraph quoted, which we have undertaken to italicize, it is plain that Greyhound's agent sells a ticket at the tariff rate which gives the Harrah's Club passenger something of value over and above the cost of the transportation. This is just as much a participation in rebating as if the D. C. Transit system were to give its Woodward & Lothrop passengers an extra premium card redeemable at that store in return for the same fare at which it sold only tokens to its Hecht or Garfinckel passengers. In each instance, the particular passenger gets a bonus that others paying the same tariff rate are not given.

It makes no difference whether the agent selling the three-coupon ticket described by Greyhound's witness is employed by Greyhound or by Harrah's Club. Greyhound can no more insulate itself from such a palpable violation of the rebating provisions of the Interstate Commerce Act by participating with another to reach the prohibited result, than the New York Central could, by making a trackage agreement with the Cleveland Stock Yards, effectuate a discrimination against a consignee of livestock that it was admittedly disabled from perpetrating on its own. *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169.

All of the matters complained of above rested on the testimony of Greyhound's General Traffic Manager. On some he was corroborated; on none was he contradicted. Yet with the sole exception of the preference accorded the larger casinos in respect of the better equipment furnished (J. S. App. A16), the Commission made no findings respecting any of them. That indisputable and uncontrovertible fact demonstrates and underscores the Commission's consistent bias in favor of Greyhound far more eloquently than anything we could add by way of gloss.

II. HERE THE COMMISSION CUT OFF AN EXISTING SERVICE FOR THE STATED REASON THAT GREYHOUND, A FAR LARGER CARRIER THAN APPELLANT, REQUIRED PROTECTION FROM "NEW COMPETING SERVICE"

The basic question presented (J. S. 2) is "Whether the Interstate Commerce Commission may cut off an existing service on the footing of protecting a carrier from 'new competing service' ", and not, as misstated by Greyhound (GH 2), simply whether the Commission acted properly in denying Peerless' application "upon the ground that no showing had been made that the existing carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories."

The heart of this case is that Peerless originally carried on, as authorized "charter operations" that its operating head considered legal (Tr. 261, 262), the same traffic that it now seeks to transport under the rubric of "special operations". If Peerless had been an utter newcomer to the field, then, plainly enough, it could probably never, with any foreseeable chance of success, have obtained entry thereto. But it was in no sense a newcomer, having carried some 32,000 persons during a 15-month period over the routes now in question; and so the Commission found (J. S. App. A6).

The Commission avoids Greyhound's error—if only by failing to formulate any "Question Presented". The Commission here admits, as it must, the central fact that Peerless was not new to the field; and the Commission faces up to Peerless' contentions, at least to the extent of asserting (Govt. 5) that "The flaw in appellant's argument is that it would overlook the illegality of the operations sought to be relied on."

Not at all. In failing to contest further the district court's approval of the Commission's cease and desist order, Peerless simply recognized that this Court does not sit to hold the Commission's pen when the somewhat

blurred line between "charter operations" and "special operations" is to be drawn. To that extent—and for that reason—Peerless acquiesced in the ruling that its activities in conjunction with Travis fell beyond the scope of "charter operations".

None the less, Peerless asserts that the line between "charter operations" and "special operations" is an indistinct one (see J. S. 10-11, 16-17), as indeed the Commission recognized in distinguishing (J. S. App. A10, A11) its own prior ruling in *Snodgrass Broker Application*, 76 M. C. C. 739, a case very close to this one on the facts, and one which assuredly led Peerless to believe that Travis did not need a broker's license. Moreover, the Commission here, while contending and citing cases for the proposition that the distinction between "charter operations" and "special operations" is a clear one (Govt. 6), does not once undertake to formulate the difference—an omission going even a step beyond the non-so-apocryphal law professor's comment on a gossamer line that had been drawn: "I can state it, but don't ask me to repeat it."

We submit that Peerless' failure to guess correctly on which side of the "charter operations", "special operations" line its activities would ultimately be held to fall in the present setting, particularly where it succeeded to another carrier's similar earlier service (Tr. 68-69, 262-263) that had been explained to and apparently never questioned by the Commission (Tr. 102-103, 106, 108, 110), does not deserve, and cannot fairly receive, the blanket condemnation of "illegality" (Govt. 5). Instead of being thus stigmatized, Peerless should rather be commended for having sought to regularize its position after the Commission had, by bringing a premature suit, indicated dissatisfaction therewith (J. S. 7). Peerless should no more be penalized for its error of law in misapprehending the scope of *Snodgrass Broker Application*, 76 M. C. C. 739, than the Commission has been disadvantaged for having originally carried to the courts a

matter that was properly the subject of administrative determination in the first instance. To suggest the contrary is all but to resurrect the rigidity of the medieval common law before the first statute of jeofails.

In that setting, it is surely no answer for the Commission to block Peerless' present effort at regularization by calling its existing traffic "new competing service", and thus virtually to preclude relief. Such a step, such a descent into the jurisprudence of labels, is more than (GH 6) an "exercise of judgment". It goes to power—and the Commission has no power to assimilate existing service to new service in the "exercise of judgment" or the "exercise of discretion" (*id.*).

When the Commission held that Peerless' existing traffic constituted "new competing service" against which Greyhound must be protected, it decided a question of law—and, in the present context, a substantial question of law.

III. THE RULING BELOW SHOULD BE REVIEWED BECAUSE IT APPROVES THE PRECISE KIND OF SPECIAL FAVORITISM AGAINST WHICH THE INTERSTATE COMMERCE ACT WAS DIRECTED

Notwithstanding the unquestioned rule that the Interstate Commerce Act and all amendments thereto "have aimed at wiping out discriminations of all types" (*United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, 175), it is clear that in the present case the Commission has put out of view the substantial discriminations practiced by Greyhound while pushing into view the technical violations by Peerless based on the latter's failure accurately to predict that, despite *Snodgrass Broker Application*, 76 M. C. C. 739, Travis would be held a broker rather than an agent of the casinos for which he sought customers.

And the court below, by rigidly adhering to stereotyped formulas of judicial review, similarly ignored the far more serious violations by Greyhound to which the Commission studiously closed its eyes. By thus emphasizing names

rather than realities, by thus reverting to an easy technique whose shortcomings were long since exposed, see Pound, *Mechanical Jurisprudence*, 8 Col. L. Rev. 605 (1908), the ruling now sought to be reviewed conceals—and encourages—precisely the kind of special favoritism that the Interstate Commerce Act was designed to outlaw.

We realize, of course, that this Court cannot undertake to review every run-of-the-mill motor carrier case. But we think that the present example of both administrative and judicial blindness to obvious and uncontradicted discrimination falls so far below any tolerable level of alleged or assumed expertise as to call for further scrutiny here.

CONCLUSION

For the foregoing additional reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted.

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